

1. DEP requested feedback on the following change in their 404 Handbook, section 8.5.1: Mitigation Hierarchy:

"The following preferential hierarchy shall be followed when compensatory mitigation is required for authorizations and compliance actions, with (a) being the most preferred and (e) being the least preferred method, unless the preference is overridden as described in the third paragraph under (a), below. However, while there is a preferential hierarchy, it is recognized that flexibility is needed to address watershed needs and allow for the consideration of mitigation projects that are environmentally preferable based on a watershed approach."

EPA response:

- The language FDEP proposes to delete clarifies the requirements of 40 CFR 230 Subpart J (the federal Mitigation Rule) and that, pursuant to the Mitigation Rule, paragraph (a) is the most preferred and (e) is the least preferred option. The third party's suggested edits cause confusion as to the specific requirements of the mitigation hierarchy.
- The substance of the language FDEP proposes to add is not inconsistent with the federal Mitigation Rule.
- If FDEP wishes to revise the original language, we believe additional edits along the lines of the following could be made while maintaining clarity and consistency with 40 CFR 230 Subpart J. The edits below would retain the deleted language but also include the proposed additional language with minor edits to ensure consistency with the preceding sentence.

"The following preferential hierarchy shall be followed when compensatory mitigation is required for authorizations and compliance actions, with (a) being the most preferred and (e) being the least preferred method, unless the preference is overridden as described in the third paragraph under (a), below. While there is a preferential hierarchy, it is recognized that flexibility may be needed to address watershed needs and allow for the consideration of mitigation projects that are environmentally preferable based on a watershed approach, so long as they are consistent with 40 CFR 230.93(b)."

2. DEP also requested feedback on the following changes to their 404 Handbook, sections 2.0, 5.1 and 5.33

2.0 Definitions and Terms

(b) The following additional definitions and terms below are used solely for purposes of Chapter 62-331, F.A.C., and this Handbook.

....

21. "Material permit modification" and "material changes in the scope of project" mean, for the purpose of applying Section 373.4146(5), F.S., only those modifications or changes that result in a significant increase in the total project environmental impact, including wildlife impacts, or significant increase in the total project wetland impact.

EPA response:

- For the purposes of clarity, we recommend adding the term "but not limited to" prior to "wildlife impacts" (i.e., "...including but not limited to wildlife impacts...").
- For the purposes of clarity, we recommend replacing the term "project wetland impact" with "impact to state-assumed or retained waters").

- If the above recommendations are to be incorporated, our proposed revisions would read as follows:

21. "Material permit modification" and "material changes in the scope of the project" mean, for the purposes of applying Section 373.4146(5), F.S., only those modifications or changes that result in a significant increase in the total project environmental impact, including but not limited to wildlife impacts, or a significant increase in the impact to state-assumed or retained waters.

5.1 General Procedures

The Agencies are required to follow procedural statutes and rules to review and act on applications and notices, and to provide rights to the public to object to Agency decisions. These statutes and rules include: Chapter 120, F.S., (Florida Administrative Procedures Act), Chapters 28-101 through 28-110, F.A.C., (Uniform Rules of Procedure), and each Agency's adopted Exceptions to the Uniform Rules of Procedure.

In acknowledgement that procedures required under Section 404 of the CWA may conflict with the above state procedural statutes and rules, Section 373.4146, F.S., provides the following:

...

* The decision by the Department to approve the reissuance of any state-administered Section 404 permit is subject to subsections 120.569 and 120.57 only with respect to any material permit modification or material change in the scope of the project as originally permitted.

EPA response: We have no concerns with this suggested change.

5.3.3 Continuation of Permits and Review for a New Permit for an Existing Project

(c)4. The amount of time needed to finish the project (no more than five years).

Applications for a new permit will be processed as a new individual permit, including all public notice requirements, and if applicable, shall be subject to reissuance requirements of 373.4146(5), F.S.

EPA response: We have no concerns with this suggested change.